No. _____

Supreme Court, U.S.
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IN THE

United States Supreme Court

LYNDON YOUNG, also known as Lyndon Christopher Young, also known as Lyndon Griffith,

Petitioner,

v.

ERIC H. HOLDER, JR., U.S. ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether an alien convicted only of simple possession of a controlled substance – a misdemeanor under both state and federal law – may be deemed "convicted" of an "aggravated felony" under federal immigration law simply because he theoretically *could* have been prosecuted as a recidivist possessor.

PARTIES TO THE PROCEEDING

Petitioner is Lyndon Christopher Young, petitioner below.

Respondent is United States Attorney General Eric H. Holder, Jr., respondent below.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

INDEX OF APPENDICES iv

TABLE OF AUTHORITIES v

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

APPLICABLE STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE PETITION 5

A. THERE IS A DIRECT AND ACKNOWLEDGED CONFLICT AMONG THE COURTS OF APPEALS ON THE QUESTION PRESENTED 5

B. THE QUESTION PRESENTED IS HIGHLY IMPORTANT AND RECURRING 8

C. THE COURT OF APPEALS ERRED IN HOLDING THAT YOUNG HAS BEEN "CONVICTED" OF AN "AGGRAVATED FELONY" 11

CONCLUSION 16

INDEX OF APPENDICES

APPENDIX A
Opinion, United States Court of Appeals for the Fifth Circuit, September 21, 2009 ..... 1a

APPENDIX B
Opinion, Board of Immigration Appeals, February 27, 2008 ..... 3a

APPENDIX C
Oral Opinion and Order, United States Department of Justice Executive Office for Immigration Review United States Immigration Court, Oakdale, Louisiana, September 6, 2007 ..... 12a

APPENDIX D
Relevant Statutory Provisions, codified at 8 U.S.C. § 1101(a)(43)(B), 8 U.S.C. § 1229b(a), 18 U.S.C. § 924(c)(2), 21 U.S.C. § 844, and 21 U.S.C. § 851 ..... 21a

TABLE OF AUTHORITIES

CASES

Alexis v. Holder,
No. 08-60745, 2009 WL 3806069
(5th Cir. Nov. 13, 2009) 8

Alsol v. Mukasey,
548 F.3d 207 (2d Cir. 2008) ..... *passim*

Ata v. Holder,
No. 08-60636, 2009 WL 3525739
(5th Cir. Oct. 29, 2009) 8

Berhe v. Gonzales,
464 F.3d 74 (1st Cir. 2006) 6

Bharti v. Holder,
No. 08-60387, 2009 WL 3816967
(5th Cir. Nov. 16, 2009) 7

Carachuri-Rosendo v. Holder,
570 F.3d 263 (5th Cir. 2009) ..... *passim*

Matter of Carachuri-Rosendo,
24 I&N Dec. 382 (BIA 2007) 6

De Leon-Castro v. Holder,
No. 06-60451, 2009 WL 3780683
(5th Cir. Nov. 12, 2009) 8

Deavila v. Holder,
No. 09-60181, 2009 WL 3929909
(5th Cir. Nov. 19, 2009) 7

Diaz-Saenz v. Holder,
No. 08-60108, 2009 WL 3780717
(5th Cir. Nov. 12, 2009) 8

Douglas v. Holder,
No. 08-60318, 2009 WL 3614535
(5th Cir. Nov. 3, 2009) 7

Esmaili v. Holder,
No. 09-60115, 2009 WL 3345768
(5th Cir. Oct. 19, 2009) 7

Fernandez v. Mukasey,
544 F.3d 862 (7th Cir. 2008) 6

Hathaway v. Holder,
No. 08-61064, 2009 WL 2971787
(5th Cir. Sept. 17, 2009) 8

INS v. Errico,
385 U.S. 214 (1966) 15

INS v. St. Cyr,
533 U.S. 289 (2001) 10

King v. Holder,
No. 08-60762, 2009 WL 3833776
(5th Cir. Nov. 17, 2009) 7

Laguna-Hernandez v. Holder,
No. 08-60477, 2009 WL 3786077
(5th Cir. Nov. 12, 2009) 7

Leocal v. Ashcroft,
543 U.S. 1 (2004) 15

Lopez v. Gonzalez,
549 U.S. 47 (2006) 8, 13

Martinez-Valero v. Holder,
No. 08-60234, 2009 WL 3780708
(5th Cir. Nov. 12, 2009) 8

Mosqueda-Masiel v. Holder,
No. 08-60843, 2009 WL 3270926
(5th Cir. Oct. 13, 2009) 8

Okechukwu Osuagwu v. Holder,
No. 08-60579, 2009 WL 3634432
(5th Cir. Nov. 4, 2009) 8

Phillip v. Holder,
No. 08-60063, 2009 WL 4609833
(5th Cir. Dec. 8, 2009) 7

Pineda-Galvan v. Holder,
No. 08-60549, 2009 WL 4421270
(5th Cir. Dec. 3, 2009) 7

Rasheed v. Holder,
No. 08-60282, 2009 WL 4411429
(5th Cir. Dec. 3, 2009) 7

Rashid v. Mukasey,
531 F.3d 438 (6th Cir. 2008) 6, 12

Ruiz v. Holder,
No. 08-60261, 2009 WL 3833979
(5th Cir. Nov. 17, 2009) 7

Simpson v. Holder,
No. 08-60874, 2009 WL 3524929
(5th Cir. Oct. 30, 2009) 8

Spence v. Holder,
No. 09-60102, 2009 WL 3833621
(5th Cir. Nov. 17, 2009) 7

Stanley v. Holder,
No. 08-60424, 2009 WL 3780705
(5th Cir. Nov. 12, 2009) 8

Steele v. Blackman,
236 F.3d 130 (3d Cir. 2001) 6

Straker v. Holder,
No. 07-60285, 2009 WL 3471916
(5th Cir. Oct. 26, 2009) 8

United States v. LaBonte,
520 U.S. 751 (1997) 12

STATUTES

8 U.S.C. § 1101(a)(43) 2, 13

8 U.S.C. § 1101(f)(8) 9

8 U.S.C. § 1158(b)(2) 8, 9

8 U.S.C. § 1182(a)(9)(A)(ii) 9

8 U.S.C. § 1227(a)(2) 3, 8

8 U.S.C. § 1228(c) 8

8 U.S.C. § 1229b(a) 8, 11, 13, 14

8 U.S.C. § 1252 8

8 U.S.C. § 1326 9

18 U.S.C. § 924(c) 2, 12

21 U.S.C. § 844 ..... 2, 11, 12

21 U.S.C. § 851 ..... *passim*

28 U.S.C. § 1254(1) 1

N.Y. Penal Law § 221.05 ..... 3, 11

N.Y. Penal Law § 221.10 3

N.Y. Penal Law § 265.02 3

ADMINISTRATIVE MATERIALS

8 C.F.R. § 316.10(b)(1)(ii) 9

OTHER AUTHORITIES

H.R. Rep. No. 91-1444 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566, 4576 14

PETITION FOR A WRIT OF CERTIORARI

Petitioner seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Appendix ("App.") A), No. 08-60278, 2009 WL 2998905, is unreported. The decision of the Board of Immigration Appeals (App. B) is unreported. The decision of the Immigration Judge (App. C) is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on September 21, 2009. (App. A.) This petition is being timely filed by postmark on or before December 21, 2009 pursuant to Supreme Court Rule 13.1. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

APPLICABLE STATUTORY PROVISIONS

The relevant statutory provisions are reproduced at Appendix D.

STATEMENT OF THE CASE

1. This petition raises the same question presented by the petitions for certiorari in *Carachuri-Rosendo v. Holder*, No. 09-60 (filed July 15, 2009): whether an alien convicted only of simple possession

of a controlled substance – a misdemeanor under both state and federal law – may be deemed "convicted" of an "aggravated felony" under federal immigration law simply because he theoretically *could* have been prosecuted as a recidivist possessor. For the same reasons articulated by the petition in *Carachuri-Rosendo*, on which this Court issued a writ of certiorari on December 14, 2009, the Court should grant this petition, hold this petition pending resolution of the *Carachuri-Rosendo* petition, and then dispose of this petition accordingly.

2. In relevant part, the Immigration & Naturalization Act ("INA") defines an aggravated felony as "illicit trafficking in a controlled substance . . . including a drug trafficking crime (as defined in section 924(c) of title 18)." 8 U.S.C. § 1101(a)(43)(B). A "drug trafficking crime" is defined under Section 924(c) to include "any felony punishable under the Controlled Substances Act [CSA]." 18 U.S.C. § 924(c)(2). Simple possession of drugs, or possession with no intent to distribute, is ordinarily a misdemeanor, not an aggravated felony. *See* 21 U.S.C. § 844(a). But if a defendant has a prior conviction for simple possession, the prosecutor has discretion to seek a recidivist sentencing enhancement of up to two years' imprisonment. *Id.* Before a defendant is subject to an enhanced sentence, the prosecutor must establish the existence of the defendant's prior conviction. 21 U.S.C. § 851.

3. Petitioner Lyndon Christopher Young is a forty-four year old native and citizen of Trinidad and Tobago. In 1976, at age ten, Young emigrated to the United States with his mother and became a

lawful permanent resident of the United States. Pet. C.A. Br. 4; App. 14a n.1. He grew up in the United States, never returning to Trinidad, and has no remaining relatives in Trinidad. I.J. Tr. at 40, 43, 44. Young is married to a United States citizen with whom he has four children, each of whom is also a United States citizen. Pet. C.A. Br. 4.

On February 16, 1996, Young pleaded guilty to unlawful possession of marijuana, a petty violation under New York Penal Law ("N.Y.P.L.") § 221.05, and to criminal possession of a weapon in the third degree for possessing a gun, in violation of N.Y.P.L. § 265.02. Pet. C.A. Br. 4–5. The New York state court imposed concurrent sentences of four months' imprisonment and five years' probation. *Id.* On August 4, 2006, Young pleaded guilty to misdemeanor possession of marijuana in the fifth degree, in violation of N.Y. Penal Law § 221.10, and was sentenced by the New York state court to time served and a six-month suspension of his driver's license. Pet. C.A. Br. 5.

On March 24, 2007, the United States government initiated removal proceedings against Young on the basis of his 1996 weapons conviction, under 8 U.S.C. § 1227(a)(2)(C), and his 2006 marijuana possession conviction, under 8 U.S.C. § 1227(a)(2)(B)(i). C.A.R. 366–70; Pet. C.A. Br. 2. Young was detained shortly thereafter and transferred from New York to a federal detention facility in Oakdale, Louisiana. C.A.R. 363. On July 3, 2007, the government asserted that Young was also removable as an aggravated felon under 8 U.S.C. § 1227(a)(2)(A(iii), based upon only the 1996

violation and 2006 misdemeanor convictions. C.A.R. 363–65; Pet. C.A. Br. 2. Young appeared *pro se* before the immigration judge ("IJ") and sought cancellation of removal, withholding of removal, asylum, and protection under the Convention Against Torture. C.A.R. 184–85; Pet. C.A. Br. 3.

On September 6, 2007, the IJ ordered Young removable and found him ineligible for cancellation solely "because the two separate convictions for drug-related offenses [were] considered an aggravated felony under Fifth Circuit law." App. 14a n.1; C.A.R. 152.

Young appealed the IJ's decision to the Board of Immigration Appeals ("BIA"), arguing, *inter alia*, that his violation and misdemeanor convictions did not qualify him as an aggravated felon. App. 3a; C.A.R. 2. Bound by Fifth Circuit precedent, as recognized by the precedential BIA decision in *Carachuri-Rosendo*, the BIA affirmed. The BIA concluded that, under Fifth Circuit law, Young's 2006 marijuana possession offense was "an aggravated felony because it was committed after his prior [] conviction." App. 4a; C.A.R. 3.

Young petitioned the Fifth Circuit Court of Appeals for review. Pet. C.A. Br. 1. The Fifth Circuit suspended Young's petition pending resolution of *Carachuri-Rosendo v. Holder*, 570 F.3d 263 (5th Cir. 2009), which is now on review before this Court by writ of certiorari. No. 09-60 (cert. granted Dec. 14, 2009). Young's petition was denied *per curiam* based upon the Fifth Circuit's ruling in *Carachuri-Rosendo* that a conviction of misdemeanor

drug possession constitutes conviction of an aggravated felony if the offense is an alien's "second possession offense" and "could have been punished as a felony under the CSA's recidivism provision." 570 F.3d at 266.

REASONS FOR GRANTING THE PETITION

This petition raises the same question raised by the petitioner in *Carachuri-Rosendo*. It presents an issue of tremendous importance that is the subject of a mature, acknowledged and continuing circuit split unlikely to be resolved absent intervention by this Court. The minority position adopted by the Fifth and Seventh Circuits is contrary to statutory construction, this Court's instruction and Congressional intent. The Court should grant Young's petition, order it held pending the resolution of *Carachuri-Rosendo*, and then dispose of this petition accordingly.

A. THERE IS A DIRECT AND ACKNOWLEDGED CONFLICT AMONG THE COURTS OF APPEALS ON THE QUESTION PRESENTED

1. As explained in the *Carachuri-Rosendo* petition and acknowledged by the Fifth Circuit, the courts of appeals are split 4-2 on whether an alien in petitioner Young's circumstances can be considered convicted of an aggravated felony under the INA. *See Carachuri-Rosendo*, 570 F.3d at 268 n.5; *Carachuri-Rosendo* Pet., No. 09-60, at 8–11. Two courts of appeals, the Fifth and Seventh Circuits, have held that a second state conviction for simple

possession constitutes conviction of an aggravated felony regardless of whether there was any recidivism finding by the convicting judge or jury. App. 2a; *see Carachuri-Rosendo*, 570 F.3d at 268 n.5; *see also Fernandez v. Mukasey*, 544 F.3d 862, 866 (7th Cir. 2008) (internal quotation marks omitted), *reh'g and reh'g en banc denied*, unpublished order, Nos. 06-3476, 06-3987, 06-3994 (Apr. 16, 2009), *petition for writ of certiorari*, No. 09-5386. The Fifth Circuit adhered to that holding in Young's case.

By contrast, four circuits have held that an alien convicted a second time for simple possession cannot be considered "convicted" of an aggravated felony in the absence of any recidivism finding in the proceedings before the convicting court. *See Steele v. Blackman*, 236 F.3d 130, 136–37 (3d Cir. 2001); *Berhe v. Gonzales*, 464 F.3d 74, 85–86 (1st Cir. 2006); *Rashid v. Mukasey*, 531 F.3d 438, 443–44 (6th Cir. 2008); *Alsol v. Mukasey*, 548 F.3d 207, 210 (2d Cir. 2008). There was no recidivism finding in Young's case. C.A.R. 353.

2. The Sixth and Second circuits, like the Fifth and Seventh Circuits, have also explicitly recognized the split of authority. *See Alsol*, 548 F.3d at 213–14; *Fernandez*, 544 F.3d at 872 n.8; *Rashid*, 531 F.3d at 443–45; *Carachuri-Rosendo*, 570 F.3d at 268 n.5. This circuit conflict is mature and highly unlikely to be resolved without intervention by this Court, particularly in light of the position taken by the BIA in its en banc decision in *Carachuri-Rosendo*. *Matter of Carachuri-Rosendo*, 24 I&N Dec. 382 (BIA 2007).

In *Carachuri-Rosendo*, the BIA agreed with the circuit court majority, concluding that a second conviction for misdemeanor possession constitutes conviction of an aggravated felony only if the individual's "status as a recidivist drug possessor [was] . . . admitted or determined by a court or jury within the prosecution for the second drug crime." 24 I&N Dec. at 391. This ruling is especially significant because the BIA ordered that its interpretation governs removal proceedings in any circuit in which the court of appeals has yet to issue a controlling decision. *Id.* at 388 n.5. As a result, the interpretation adopted by the BIA and by the First, Second, Fourth and Sixth Circuits governs removal proceedings in all circuits other than the Fifth and Seventh Circuits. *See Carachuri-Rosendo* Pet., No. 09-60, at 12.

3. The question presented continues to arise frequently in both the immigration and criminal contexts. Since the Fifth Circuit issued its decision in *Carachuri-Rosendo*, it has denied 23 petitions for review of BIA decisions applying circuit precedent on the issue, including Young's petition.[1]

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[1] *See* App. 2a; *Phillip* v. *Holder*, No. 08-60063, 2009 WL 4609833, at *1 (5th Cir. Dec. 8, 2009) (per curiam); *Rasheed* v. *Holder*, No. 08-60282, 2009 WL 4411429, at *1 (5th Cir. Dec. 3, 2009) (per curiam); *Pineda-Galvan* v. *Holder*, No. 08-60549, 2009 WL 4421270, at *1 (5th Cir. Dec. 3, 2009) (per curiam); *Deavila* v. *Holder*, No. 09-60181, 2009 WL 3929909, at *1 (5th Cir. Nov. 19, 2009) (per curiam); *King* v. *Holder*, No. 08-60762, 2009 WL 3833776, at *1(5th Cir. Nov. 17, 2009) (per curiam); *Ruiz* v. *Holder*, No. 08-60261, 2009 WL 3833979, at *1 (5th Cir. Nov. 17, 2009) (per curiam); *Spence* v. *Holder*, No. 09-60102, 2009 WL 3833621, at *1 (5th Cir. Nov. 17, 2009) (per curiam);

B. THE QUESTION PRESENTED IS HIGHLY IMPORTANT AND RECURRING

1. Whether an alien is properly deemed "convicted" of an "aggravated felony" has substantial and far-reaching consequences for immigrants and their families. *See Lopez v. Gonzalez*, 549 U.S. 47, 50-51 (2006). An alien convicted of an aggravated felony is both subject to removal and presumed removable, 8 U.S.C. §§ 1227(a)(2)(A)(iii), 1228(c); ineligible to seek judicial review of a removal order, 8 U.S.C. § 1252(a)(2)(C); and ineligible to seek cancellation of removal or asylum. 8 U.S.C.

Bharti v. Holder, No. 08-60387, 2009 WL 3816967, at *1 (5th Cir. Nov. 16, 2009) (per curiam); *Alexis* v. *Holder*, No. 08-60745, 2009 WL 3806069, at *1 (5th Cir. Nov. 13, 2009) (per curiam); *Stanley* v. *Holder*, No. 08-60424, 2009 WL 3780705, at *1 (5th Cir. Nov. 12, 2009) (per curiam); *Diaz-Saenz* v. *Holder*, No. 08-60108, 2009 WL 3780717, at *1 (5th Cir. Nov. 12, 2009) (per curiam); *De Leon-Castro* v. *Holder*, No. 06-60451, 2009 WL 3780683, at *1 (5th Cir. Nov. 12, 2009) (per curiam); *Martinez-Valero* v. *Holder*, No. 08-60234, 2009 WL 3780708, at *1 (5th Cir. Nov. 12, 2009) (per curiam); *Laguna-Hernandez* v. *Holder*, No. 08-60477, 2009 WL 3786077, at *1 (5th Cir. Nov. 12, 2009) (per curiam); *Okechukwu Osuagwu* v. *Holder*, No. 08-60579, 2009 WL 3634432, at *1 (5th Cir. Nov. 4, 2009) (per curiam); *Douglas* v. *Holder*, No. 08-60318, 2009 WL 3614535, at *1 (5th Cir. Nov. 3, 2009) (per curiam); *Simpson* v. *Holder*, No. 08-60874, 2009 WL 3524929, at *1 (5th Cir. Oct. 30, 2009) (per curiam); *Ata* v. *Holder*, No. 08-60636, 2009 WL 3525739, at *1 (5th Cir. Oct. 29, 2009) (per curiam); *Straker* v. *Holder*, No. 07-60285, 2009 WL 3471916, at *1 (5th Cir. Oct. 26, 2009) (per curiam); *Esmaili* v. *Holder*, No. 09-60115, 2009 WL 3345768, at *1 (5th Cir. Oct. 19, 2009) (per curiam); *Mosqueda-Masiel* v. *Holder*, No. 08-60843, 2009 WL 3270926, at *2 (5th Cir. Oct. 13, 2009) (per curiam); *Hathaway* v. *Holder*, No. 08-61064, 2009 WL 2971787, at *2 (5th Cir. Sept. 17, 2009) (per curiam).

§§ 1229b(a)(3), 1158(b)(2)(A)(ii), 1158(b)(2)(B)(i); *see Carachuri-Rosendo* Pet., No. 09-60, at 15.

If removed from the United States, an aggravated felon is permanently barred from seeking readmission to the country (absent a waiver), and is subject to increased punishment if he or she returns. *See* 8 U.S.C. §§ 1182(a)(9)(A)(ii), 1326(a)-(b) (increasing maximum sentence for illegal entry into the country from two to twenty years of imprisonment). If convicted of an aggravated felony on or after November 29, 1990, an alien is categorically unable to demonstrate the "good moral character" required for naturalization. 8 U.S.C. § 1101(f)(8); 8 C.F.R. § 316.10(b)(1)(ii). Moreover, because federal law automatically categorizes any aggravated felony as a "particularly serious crime," an aggravated felon is ineligible for asylum. *See* 8 U.S.C. §§ 1158(b)(2)(A)(ii), (B)(i); *Carachuri-Rosendo* Pet., No. 09-60, at 15–16; App. 14a n.1.

2. Given the grave consequences to aliens of being treated as aggravated felons, a uniform interpretation of the relevant statutes is imperative. The site of immigration detention is frequently determined by capacity and has no relationship to the location of the alien's conviction or residence. Consequently, aliens may be transferred from a judicial circuit that subscribes to the majority interpretation of the meaning of "aggravated felon" to a location under the purview of the Fifth or Seventh Circuit. *Carachuri-Rosendo* Pet., No. 09-60, at 7.

Young was put in precisely this position. He was convicted in New York, his state of residence for more than 30 years, but transferred to Louisiana for detention. Had Young been detained in New York, he would have been eligible for cancellation of removal because his second possession conviction would not have been converted to an aggravated felony under Second Circuit law. *See Alsol v. Mukasey*, 548 F.3d 207, 210 (2d Cir. 2008). But as the consequence of an arbitrary transfer, Young was denied the opportunity to request cancellation – another victim of the circuit split on this important issue. The uncertainty caused by conflicting interpretations frustrates the ability of defense counsel and prosecutors to offer an alien charged with a possession offense, like Young, meaningful advice concerning the immigration consequences of a guilty plea or conviction. *See INS v. St. Cyr*, 533 U.S. 289, 322 (2001) ("There can be little doubt that . . . alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions.").

3. Like *Carachuri-Rosendo*, this case presents a deeply concerning example of the substantial implications of the question presented for an alien designated as an "aggravated felon." Young came to the United States as a lawful permanent resident at a very young age, after which he never returned to his country of origin until he was deported in September of this year. His wife, four biological children, one stepchild and mother are all United States citizens, and his entire family remains in New York.

Young was removed from the country and separated from his family based on his conviction for possession of a small quantity of marijuana for personal use. The prosecutor exercised discretion to forego charging Young as a recidivist based on the earlier conviction of a violation for possession – the statutory equivalent of a traffic ticket in New York. N.Y.P.L. § 221.05 But the Fifth Circuit's approach effectively overrides that exercise of prosecutorial discretion and classifies Young as an "aggravated felon" just because he *could* have been prosecuted as a recidivist. The contrary view adopted by a majority of circuits – the controlling view in Young's state of residence – would enable Young to seek relief that would allow him to live in the United States with his family.

C. THE COURT OF APPEALS ERRED IN HOLDING THAT YOUNG HAS BEEN "CONVICTED" OF AN "AGGRAVATED FELONY"

The Fifth Circuit's position that conviction for misdemeanor possession subjected Young to mandatory removal on the theory that Young *could* have been prosecuted as an aggravated felon cannot be squared with the language of the statutes at issue, nor with this Court's precedent or Congressional intent. *See* 21 U.S.C. § 844; *see also Carachuri-Rosendo* Pet., No. 09-60, at 17–24.

1. The INA subjects to mandatory deportation any alien "convicted" of an "aggravated felony," *i.e.*, a "felony punishable under" the federal drug laws. 8 U.S.C. § 1229b(a)(3); 18 U.S.C.

§ 924(c)(2). Someone convicted of simple possession has been "convicted" of an offense that under federal law is punishable as a misdemeanor, not a felony. *See* 21 U.S.C. § 844(a). That is true regardless of whether that person *could have been* prosecuted for felony recidivist possession.

The statutory language focuses on the crime for which a person "has been convicted", not what that person theoretically could have been prosecuted for. *See Alsol*, 548 F.3d at 215 (INA requires "an actual conviction for an offense that proscribes conduct that is punishable as a federal felony, not a conviction that *could* have been obtained *if* it had been prosecuted") (emphasis in original); *accord Rashid*, 531 F.3d at 445 (statutory question is "whether the crime that an individual was *actually convicted of* would be a felony under federal law," not "what federal crimes an individual could hypothetically have been charged with"); *Carachuri-Rosendo* Pet., No. 09-60, at 18.

The significance of the INA's requirement of a felony conviction is all the more clear when compared with the outcome in an analogous federal law prosecution. Had Young been prosecuted for possession under federal law, he could only have been sentenced as a recidivist felon if the prosecutor charged him with recidivism, and the district court found that he was a recidivist. 21 U.S.C. §§ 844(a), 851. Failing that, Young could not be treated as having been convicted of the felony of recidivist possession simply because the federal prosecutor *could have* charged him as a recidivist. *See United States v. LaBonte*, 520 U.S. 751, 759-60 (1997)

("[F]or defendants who have received the notice under § 851(a)(1), . . . the 'maximum term authorized' is the enhanced term. For defendants who did not receive the notice, the unenhanced maximum applies.")

The analysis and treatment under state and federal law convictions should be the same. The statutory language of the INA so requires. *See* 8 U.S.C. § 1101(a)(43) (applying the definition of aggravated felony to an offense "whether in violation of Federal or State law"). To treat a person as subject to mandatory deportation simply because he was prosecuted under state instead of federal law flies in the face of the careful statutory constructs created by Congress and interpreted by this Court. *See, e.g., Lopez v. Gonzales*, 549 U.S. 47 (2006).

2. Construing "has [] been convicted", 8 U.S.C. § 1229b(a), to mean "could have been convicted" is inconsistent with a commonsense interpretation of the statutory language. In *Lopez*, this Court emphasized that statutory language should be subject to "commonsense" interpretation unless a "clear statutory command . . . coerced" an alternate interpretation. *Lopez*, 549 U.S. at 55 n.6. There is no statutory command here that requires an alternative interpretation. The language of section 1229b(a) does not contemplate treating conviction for simple possession as an aggravated felony simply because it could have been prosecuted as recidivist possession instead. To the contrary, given the textual requirement of a felony "conviction," there is actually a statutory command that forbids treating Young's conviction as an aggravated felony. The

Fifth Circuit's interpretation of section 1229b(a) contravenes this Court's instructions in *Lopez*.

3. The Fifth Circuit's construction of the statutes at issue is also fundamentally at odds with Congress's basic objectives in amending the recidivist enhancement guidelines to allow for increased prosecutorial discretion. By enacting section 851, Congress sought to make the penalty structure for drug offenses "more flexible." H.R. Rep. No. 91-1444 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566, 4576. To accomplish that goal, Congress provided that "[n]o person . . . shall be sentenced to increased punishment by reason of one or more prior convictions" unless the prosecutor files an information prior to trial or plea alleging those prior convictions. 21 U.S.C. § 851(a)(1). By linking mandatory removal to an actual felony conviction, rather than a conceivable felony charge, Congress incorporated that same prosecutorial discretion into the removal process.

The standard employed by the Fifth Circuit is inconsistent with the congressional intent behind section 851. The Fifth Circuit's approach ignores prosecutorial discretion entirely, treating individuals like Young as recidivist felons even when a prosecutor has expressly declined to charge them as such. *See Alsol*, 548 F.3d at 217 (concluding that the standard adopted by the court below "intrude[s] on prosecutorial discretion to make charging decisions," and "undermin[es] the State's ability to negotiate plea agreements").

The Fifth Circuit's mandatory removal standard also undermines another significant feature of the recidivist conviction requirement — that the determination of recidivist possession must be made in a court of law in connection with proceedings concerning the conviction, rather than by an immigration judge. That protection is important. Under federal law, for example, a person charged with recidivist possession has an opportunity to contest the validity of a charged prior conviction. 21 U.S.C. § 851. If the prior conviction is invalid, a person may not be convicted of recidivist possession. *Id.* An immigration judge, by contrast, lacks authority to inquire into the validity of a prior conviction. *Alsol*, 548 F.3d at 217; *Carachuri-Rosendo* Pet., No. 09-60, at 21–24.

4. Finally, to the extent that there is any ambiguity on the proper interpretation of the statute, the rule of lenity requires an interpretation that favors Young. *See INS v. Errico*, 385 U.S. 214, 225 (1966); *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004); *Carachuri-Rosendo* Pet., No. 09-60, at 24. Here, at the very least, the Fifth Circuit's interpretation is not compelled by the statute. The rule of lenity therefore requires its rejection. *Fernandez* Pet., No. 09-5386, at 11.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

KENNETH M. KRAMER
(*Counsel of Record*)
ADAM S. HAKKI
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December 21, 2009

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 08-60278
Summary Calendar

LYNDON CHRISTOPHER YOUNG, also known as Lyndon Young, also known as Lyndon Griffith

Petitioner

v.

ERIC H HOLDER, JR, U S ATTORNEY GENERAL

Respondent

Petition for Review of an Order of the Board of Immigration Appeals
BIA No. A35 750 048

Before HIGGINBOTHAM, CLEMENT, and SOUTHWICK, Circuit Judges.
PER CURIAM:[1]

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[1] Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Lyndon Christopher Young, a citizen of Trinidad and Tobago, petitions for review of an order of the Board of Immigration Appeals ("BIA"). It found him to be ineligible for cancellation of removal because his 2006 New York marijuana possession conviction constituted an aggravated felony for purposes of immigration law. Young contends solely that the BIA erred by treating his conviction as equivalent to the federal offense of "recidivist possession." *See* 21 U.S.C. § 844(a).

We conclude that the BIA correctly determined that Young's offense constituted an aggravated felony for immigration law purposes. *See Carachuri-Rosendo v. Holder,* 570 F.3d 263, 266-68 (5th Cir. 2009), *petition for cert. filed* (July 15, 2009) (No. 09-60).

PETITION DENIED.

APPENDIX B

U.S. Department of Justice
Decision of the Board of Immigration Appeals
Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A35 750 048 - Oakdale, LA
Date: FEB 27 2008

In re: LYNDON CHRISTOPHER YOUNG a.k.a. Lyndon Young a.k.a. Lyndon Griffith

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Kenneth M. Kramer, Esquire

ON BEHALF OF DHS: Monique Harris
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(C), I&N Act [8 U.S.C. § 1227(a)(2)(C)] - Convicted of firearms or destructive device violation

Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] - Convicted of controlled substance violation

Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

APPLICATION: Asylum, withholding of removal, Convention Against Torture

The respondent, a lawful permanent resident and a native and citizen of Trinidad and Tobago, appeals an Immigration Judge's September 6, 2007, decision finding him removable as charged, based on the respondent's record of convictions. *See* I.J. at 2. The Immigration Judge also determined that the respondent was not eligible for cancellation of removal under section 240A(a) of the Immigration and Nationality Act. *Id.* Furthermore, the Immigration Judge denied the respondent's applications for asylum and withholding of removal under sections 208 and 241(b)(3) of the Act, and protection under the Convention Against Torture. *See* I.J. at 2, 6-8. The appeal will be dismissed.

The respondent was convicted in 1996 for unlawful possession of a controlled substance, namely marijuana, in violation of N.Y. Penal Law §221.05, and for criminal possession of a weapon in the third degree under N.Y. Penal Law § 265.02. In 2006, he was convicted of criminal possession of marijuana in the fifth degree in violation of N.Y. Penal Law § 221.10. *See* Exhs. 2, 3. The respondent does not dispute that these convictions render him removable pursuant to the charges noted above. However, the respondent argues that his controlled substance convictions cannot be considered an aggravated felony under the Act, and these convictions could not act as a bar to consideration of cancellation of removal under section 240A(a)(3) of the Act.

The Immigration Judge found the respondent's 2006 conviction for criminal possession of marijuana qualifies as an aggravated felony under section 101(a)(43)(B) of the Act, 8 U.S.C. § 1101(a)(43)(B), because it corresponds to the federal felony offense of "recidivist possession" when considered in conjunction with the respondent's prior 1996 conviction for unlawful possession of marijuana. *See* I.J. at 2. *See also Lopez v. Gonzales*, 127 S. Ct. 625, 631 n.6 (2006).

The respondent argues on appeal that we should apply the "rule of lenity" because of alleged statutory ambiguities. However, we find this appeal is controlled by our precedent decision in *Matter of Carachuri-Rosendo*, 24 I&N Dec. 382 (BIA 2007), in which we determined that decisional authority from the Supreme Court and the controlling Federal circuit court of appeals is determinative of whether a State drug offense constitutes an "aggravated felony" by virtue of its correspondence to the Federal felony offense of "recidivist possession." *Id.* at 385-86. Relying on the alternate holding of the United States Court of Appeals for the Fifth Circuit, the jurisdiction wherein this case arises, in *United States v. Sanchez-Villalobos*, 412 F.3d 572, 576-77 (5th Cir. 2005), we also determined that an alien convicted under Texas law of simple possession of a controlled substance, based on an offense committed after a prior Texas drug conviction became final, stood convicted of an aggravated felony in the Fifth Circuit. *Id.* at 386-87.

The present record reflects that the respondent was convicted of two controlled substance violations in 1996 and 2006 and there is no indication in the record of conviction that these convictions were ever appealed. *See Smith v. Gonzales*, 468 F.3d 272, 277-78 (5th Cir. 2006) (holding that the "finality" of a prior conviction under 21 U.S.C. § 844(a) is determined by reference to the exhaustion of appeal rights.) Although the respondent argues that his 2006 controlled substance offense should not qualify as an aggravated felony because it was not prosecuted as a recidivist offense under New York law, Fifth Circuit precedent does not impose any such requirement. *Matter of Carachuri-Rosendo*, *supra*, at 387, 394. Thus, we conclude that the respondent's 2006 marijuana possession offense is an aggravated felony because it was committed after his prior marijuana possession conviction became final. As such, it renders him statutorily ineligible for cancellation of removal pursuant to section 240A(a)(3) of the Act. In view of the foregoing, we agree with the Immigration Judge that the respondent is subject to removal from the United States based on the respondent's record of convictions.

It is contended by the respondent that the Immigration Judge denied him due process by not informing the respondent that he could file a motion to change his venue. He alleges that his residence is in New York State and all witnesses favorable to his application reside in New York. We note that there is no provision of law or regulation that requires an Immigration Judge to inform a respondent that he or

she may file a motion to change venue. Furthermore, granting a motion to change venue is discretionary upon a showing of good cause by an alien. *See* 8 C.F.R. 1003.20. The respondent's ability to present evidence or witnesses was not precluded in the current case as the respondent was afforded the opportunity to present written statements and provide oral testimony by telephonic connection. *See* I.J. at 7. It is the responsibility of the respondent to provide evidence and witnesses in support of his applications for protection and a witness's inability or refusal to participate in a telephonic conference does not show good cause for a change of venue or that the Immigration Judge is biased. In the current case, the Immigration Judge made multiple attempts to contact the identified witness and discontinued after it became apparent that additional attempts would be futile. *See* Tr. at 62-64. In addition, the respondent argues that another alien's transcript has been associated with his file and has adversely affected the Immigration Judge's decision. *See* Tr. at 16-32. While the respondent is correct that another alien's transcript is associated with this file, there is no indication in the Immigration Judge's decision that this information was in any way used in making his determination. Therefore, the misplacement of this transcript is nothing more than harmless error. Finally, the respondent's impression that the precedents of the United States Court of Appeals for the Second Circuit would be more favorable to his claims is not good cause for a change of venue under the regulations, but merely forum shopping.

Turning to the merits of his applications for withholding of removal and protection under the Convention Against Torture, the respondent argues that the Immigration Judge erred when he determined that the respondent was not a member of a particular social group, which the respondent has defined as native Trinidadians that have returned from living in the United States and are perceived to be wealthy. He claims that such individuals are targeted for kidnapping and violence, and that the Government of Trinidad and Tobago acquiesces in this behavior. We agree with the Immigration Judge that the group defined by the respondent is not a particular social group as contemplated by the Act, as this group does not share an immutable characteristic, nor are the characteristics described by the respondent fundamental to his identity or conscience. *See* I.J. at 6. *See also Matter of Acosta*, 19 I&N Dec. 211, 213 (BIA 1985), *overruled on other grounds by Matter of Mogharrabi*, 19 I&N Dec. 439, 447 (BIA 1987)(defining a particular social group as persons who share a common, immutable characteristic; something that is beyond the power of the individual to change or that is so fundamental to his identity or conscience that it ought not be required to be changed.) Furthermore, the activity of kidnapping individuals perceived to be wealthy and holding them for ransom is a criminal activity and not persecution as contemplated by the Act. *See Matter of V-T-S-*, 21 I&N Dec. 792 (BIA 1997) (holding that when an alien expresses a fear of kidnapping, in the absence of evidence to suggest motivations connected to an enumerated ground, a perpetrator motivated by a victim's wealth is not

acting on account of a qualifying ground.) We also agree with the Immigration Judge that the respondent has not presented any evidence that he would be targeted or persecuted on the grounds of a political opinion or his nationality. *See* I.J. at 6; Tr. at 44-46. Furthermore, outside of the respondent's allegation, there is no evidence that if he returned to Trinidad the government of this country would participate or acquiesce in his kidnapping. While the respondent has argued that the Immigration Judge failed to consider the documentary evidence of record in connection with his applications for protection from removal, this is not the case as the Immigration Judge specifically cited to this requirement in his decision. *See* I.J. at 5.

In light of the foregoing, we find that the respondent has failed to satisfy the clear probability standard of eligibility required for withholding of removal and he has also failed to establish that it is more likely than not he would be tortured if returned to Trinidad and Tobago. We therefore agree with the Immigration Judge's conclusion that the respondent failed to meet his burden of proof with respect to his request for protection under section 241(b)(3) of the Act and the Convention Against Torture.

The respondent also contests the Immigration Judge's finding that he is ineligible for asylum as his application for protection was submitted more than one year after his entry into the United States and he has failed to show any extraordinary circumstance to waive this bar. It is contended that the respondent's circumstances of entering the United

States in March 1976 as a minor child who had received lawful immigrant status provide an extraordinary circumstance as he did not need and was not eligible for asylum until he became removable under the charges listed above. The record shows that the respondent entered the United States in March 1976 as a legal immigrant and enjoyed status as a lawful permanent resident until May 2007 when a Notice to Appear and Warrant for Arrest were served on the respondent. He submitted his application for asylum (Form 1-589) on August 13, 2007. We agree with the respondent that his status as a legal permanent resident is an extraordinary circumstance as defined by regulation, and that his application for asylum was received within a reasonable period of time after his legal immigrant status ended. *See* 8 C.F.R, §1208.4(a)(5)(iv). However, the respondent's application for asylum is also barred due to his conviction for an aggravated felony. *See* I.J. at 2, n. 1. *See also* sections 208(b)(2)(A)(ii), (B)(i) of the Act. In addition, since the respondent failed to satisfy the required nexus between the alleged/perceived acts of persecution and a qualifying ground for protection under the Act, it follows that he would fail to satisfy his burden of proof required for asylum under section 208 of the Act. Therefore, the Immigration Judge's denial of the respondent's asylum application as time-barred is mere harmless error.

Accordingly, the following order will be entered;

ORDER: The appeal is dismissed.

/s/ Ryan A. Paul
FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Oakdale, Louisiana

File No.: A 35 750 048		September 6, 2007
In the Matter of	)	
LYNDON CHRISTOPHER	)	IN REMOVAL
YOUNG	)	PROCEEDINGS
	)	
Respondent	)	

CHARGES: Section 237(a)(2)(A)(iii), 237(a)(2)(B)(i), and 237(a)(2)(C) of the Immigration and Nationality Act, as amended.

APPLICATIONS: Withholding of removal under Section 241(b)(3); withholding and deferral of removal under the Convention against Torture.

ON BEHALF OF RESPONDENT: ON BEHALF OF SERVICE:

Pro se Monique Harris, Esquire Assistant Chief Counsel DHS/ICE Litigation Unit 1010 East Whatley Road Oakdale, LA 71463

ORAL DECISION AND ORDER OF THE IMMIGRATION JUDGE

The respondent is a 42-year-old married native and citizen of Trinidad and Tobago. The Department of Homeland Security (DHS) has brought these removal proceedings against the respondent under

the authority of the Immigration and Nationality Act ("the Act"). Proceedings were commenced with the filing of the Notice to Appear (NTA) with the Immigration Court, dated March 24, 2007. The notice was served on the respondent on May 8, 2007. [Exhibit 1]. The Department subsequently amended the Notice to Appear with a Form 1-261 dated July 3, 2007.

The respondent admits, as alleged in the Notice to Appear, that he is subject to removal based on a 1996 conviction for unlawful possession of marijuana in New York, a 2006 conviction in New York for criminal possession of marijuana in the fifth degree, and a 1996 conviction for criminal possession of a weapon in the third degree. Respondent admitted Allegations 1 through 6 of the Notice to Appear, and conceded that he is removable as charged under Sections 237(a)(2)(A)(iii), 237(a)(2)(B)(i) and 237(a)(2)(C). On the basis of respondents admissions and concessions, as well as the supporting conviction documents submitted into evidence [Exhibit 2], the Court finds that respondent's removability has been established by the Department by clear and convincing evidence, as required by Section 240(c)(3) of the Act.

The respondent declined to designate a country of removal, and Trinidad and Tobago was designated by the Court. The respondent applied for relief from removal in the form of withholding of removal under Section 241(b)(3), and also requested

withholding/deferral of removal under the Convention against Torture.[1]

The respondent's Form 1-589 application is contained in the record as Exhibit 3. The document was not admitted into the record until the date of the individual hearing on September 6, 2007, and respondent was given an opportunity to make any necessary corrections. Respondent swore to the Court that the contents of the application were all true and correct to the best of his knowledge.

STATEMENT OF THE LAW

The burden of proof is on the respondent to establish that he is eligible for withholding of removal under Section 241(b)(3) of the Act, or relief under the United Nations Convention against Torture. The provisions of the "Real ID Act of 2005" apply to the respondent's application as it was filed on or after May 11, 2005.[2]

To qualify for withholding of removal under Section 241(b)(3) of the Act, the respondent's facts

---

[1] Respondent was not eligible for asylum under Section 208 of the Act because he arrived in this country as a lawful permanent resident in 1976, and the application for relief was not filed until 2007. Likewise, respondent was not eligible for cancellation of removal, because the two separate convictions for drug-related offenses are considered an aggravated felony under Fifth Circuit law. See U.S. v. Sanchez-Villalobos.

[2] The application in the present case was filed on August 6, 2007.

must show a clear probability, that is, that it would be "more likely than not" that his life or freedom would be threatened in the country directed for removal on account of race, religion, nationality, membership in a particular social group or a political opinion. INS v. Stevic, 467 U.S. 407 (1984).

The applicant for withholding of removal under the Convention against Torture bears the burden of proving that it is "more likely than not" that he or she would be tortured as defined in the regulations, if removed to the proposed country of removal. 8 C.F.R. 1208.16(c)(2). The torture must be inflicted "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. 8 C.F.R. 1208.18(a)(1). The term "acquiescence" requires that the public official have prior awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity. 8 C.F.R. 1208.18(a)(7).

CREDIBILITY

The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that his testimony is credible, persuasive and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met his burden, the trier of fact may weigh the credible testimony along with other evidence of the record. Where the trier of fact determines that the applicant should provide

evidence that corroborates otherwise credible testimony, such evidence must be provided, unless the applicant does not have the evidence and cannot reasonably obtain it.

Considering the totality of the circumstances and all relevant factors, the trier of fact may base a credibility determination. on the demeanor, candor or responsiveness of the applicant, the inherent plausibility of his statement, the consistency between the oral and written statements, if any, the internal consistency of each such statement, the consistency of such statements with other evidence in the record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehood of such statements without regard to whether the inconsistency and accuracy or falsehood goes to the heart of his claim. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

In the present case, respondent claims that his application for withholding of removal and for relief under the Convention against Torture should be granted based on a claim that he would be persecuted or tortured if he were to return to Trinidad on the basis of nationality and/or political opinion. Upon careful consideration of all the facts, individually and cumulatively, the Court makes a firm finding that respondent was a credible witness for the following reasons: Respondent testified that he believed he would be in danger if returned to

Trinidad because he had a cousin who had been deported in 2006, and was killed in Trinidad in June of 2007. While respondent's written documents stated the belief that his cousin was killed by the government or because of some government involvement, at the hearing, respondent testified that he did not know whether his cousin was involved with the government or not. Indeed, the respondent testified at length that he believes that his brother could have been killed either by gangs or by the government. Respondent simply did not know what had happened to his cousin in Trinidad, and further, could not testify as to the circumstances of his death. Because the respondent was straightforward in his testimony, the Court finds that he was credible.

A finding that respondent is credible, however, does not necessarily lead to a finding that he is entitled to relief. Simply stated, respondent could not testify that it would be more likely than not that he would be persecuted on account of a protected ground if he were returned to Trinidad and Tobago. In his application, respondent checked off "nationality" and "political opinion" as the potential bases for persecution. In his testimony, however, respondent testified that nationality really was not at issue in this case, since he is Trinidad-born and there is only one nationality in Trinidad, that is, Trinidadian. As to the political opinion claim, respondent testified that neither he nor any member of his family were ever involved in politics in Trinidad, and that other than his cousin's unfortunate demise, no harm had ever befallen any

of his family in Trinidad. Indeed, respondent testified that his mother came to the United States in the early or mid 1970s in an attempt to provide a better life for her children. Respondent himself was brought to the United States when he was approximately 11 years old, and never returned to Trinidad. Respondent also testified that his entire family, with the exception of a distant cousin's niece, are in the United States.

The Court finds that there are no protected beliefs or "immutable traits" that respondent holes that would make him a candidate for a finding that he is entitled to relief.

Following the respondent's testimony, the Court attempted to reach the mother of respondent's late cousin. The Court made several attempts to reach the witness named Mosley at her number in Brooklyn, New York, without success. In fact, the Court allowed respondent to speak directly to his mother during the course of the hearing to confirm he telephone number. After several tries, the Court finally received a recording that said that the call would not be placed because the Government telephone used by the Court has the caller ID number blocked. It should also be noted that respondent's mother stated that she did not believe the cousin's mother was home at the time the Court attempted to make the call, and that she was probably working.

When all of the evidence is considered, it is clear that respondent did not meet his burden of

proof under either the statutory authority (Section 41(b)(3)) or under the regulatory requirements set forth for a Convention against Torture claim. Indeed, the respondent could not show that it would be more likely than not that any harm would befall him for any reason if he were to return to Trinidad. Because respondent failed to meet his burden of proof that it would be more likely than not that he would be persecuted based on a protected ground if he were to return to Trinidad, his application for relief under withholding of removal (the Act) was denied by the Court. In addition, because respondent could not provide any evidence whatsoever to support a contention that it would be more likely than not that he would be tortured by the government or someone with the government's acquiescence, his claim for relief under the Convention against Torture, likewise, failed. Since respondent's applications were denied, the Court issues the following orders.

ORDER

IT IS ORDERED that respondent's application for withholding of removal under Section 241(b)(3) of the Act is denied.

IT IS FURTHER ORDERED that respondent's request for withholding of removal under the Convention against Torture is denied.

IT IS FURTHER ORDERED that respondent's request for deferral of removal under the Convention against Torture be denied.

IT IS FURTHER ORDERED that respondent, having been found subject to removal by clear and convincing evidence, be, and is hereby, ordered removed from the United States to Trinidad and Tobago on the basis of the charges contained in the Notice to Appear.

Oakdale, Louisiana, this 6th day of September, 2007.

/s/ James A. Nugent
JAMES A. NUGENT
Immigration Judge

APPENDIX D

8 U.S.C. § 1101(a)(43)(B): Definitions
The term "aggravated felony" means—

(B) illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924 (c) of title 18).

8 U.S.C. § 1229b(a): Cancellation of removal for certain permanent residents
The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

18 U.S.C. § 924(c)(2): Penalties
For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

21 U.S.C. § 844: Penalties for simple possession
It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless

such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or
except as otherwise authorized by this subchapter or subchapter II of this chapter.
. . . .
Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of $1,000, or both, except that if he commits such offense after a prior conviction under this subchapter or subchapter II of this chapter, or a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State, has become final, he shall be sentenced to a term of imprisonment for not less than 15 days but not more than 2 years, and shall be fined a minimum of $2,500 . . . .

21 U.S.C. § 851: Proceedings to establish prior convictions
(a) Information filed by United States Attorney

(1) No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon. Upon a showing by the United States attorney that facts regarding prior convictions could not with due diligence be obtained prior to trial or

before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.

(2) An information may not be filed under this section if the increased punishment which may be imposed is imprisonment for a term in excess of three years unless the person either waived or was afforded prosecution by indictment for the offense for which such increased punishment may be imposed.

(b) Affirmation or denial of previous conviction

If the United States attorney files an information under this section, the court shall after conviction but before pronouncement of sentence inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information, and shall inform him that any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence.

(c) Denial; written response; hearing

(1) If the person denies any allegation of the information of prior conviction, or claims that any conviction alleged is invalid, he shall file a written response to the information. A copy of the response shall be served upon the United States attorney. The

court shall hold a hearing to determine any issues raised by the response which would except the person from increased punishment. The failure of the United States attorney to include in the information the complete criminal record of the person or any facts in addition to the convictions to be relied upon shall not constitute grounds for invalidating the notice given in the information required by subsection (a)(1) of this section. The hearing shall be before the court without a jury and either party may introduce evidence. Except as otherwise provided in paragraph (2) of this subsection, the United States attorney shall have the
burden of proof beyond a reasonable doubt on any issue of fact. At the request of either party, the court shall enter findings of fact and conclusions of law.

(2) A person claiming that a conviction alleged in the information was obtained in violation of the Constitution of the United States shall set forth his claim, and the factual basis therefor, with particularity in his response to the information. The person shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response. Any challenge to a prior conviction, not raised by response to the information before an increased sentence is imposed in reliance thereon, shall be waived unless good cause be shown for failure to make a timely challenge.

. . . .